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September 7, 2012

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By Hand Delivery

Honorable Martin Glenn
United States Bankruptcy Judge
United States Bankruptcy Court
for the Southern District of New York
One Bowling Green
New York, New York 10004

Re: *In re Residential Capital, LLC, et al.*, Chapter 11 Case No. 12-12020 (MG)
Hearing: September 11, 2012 at 2:00 p.m.

Dear Judge Glenn:

We are counsel to the Debtors in the above-captioned case. We write regarding the hearing scheduled for September 11, 2012 at 2:00 p.m. on the *Motion of the Federal Housing Finance Agency Pursuant to the July 11, 2012 Order of the Honorable Denise L. Cote Seeking Limited Discovery From the Debtors and, If Necessary to That Purpose, Relief From the Automatic Stay* (ECF# 806) and the supplement thereto (ECF# 859) (the "FHFA Motion"), as well as the *Non-Ally Underwriter Defendants' Motion in Support of Loan File Discovery From the Debtors and, If Necessary to That Purpose, Relief From the Automatic Stay* (ECF# 1293) (the "Underwriters' Motion" and together with the FHFA motion, the "Motion"). We are writing to bring to the Court's attention recent developments in the Coordinated FHFA Cases (as hereinafter defined) that may affect the hearing on the Motion.

As the Court is aware, the discovery sought by the FHFA and the Non-Ally Underwriters in the Motion—thousands of loan files—relates to a case pending before Judge Cote in the District Court captioned *FHFA v. Ally Financial, Inc. et al*, 11 Civ. 7010 (the "Ally Case"). The Ally Case is one among 16 cases coordinated for pre-trial purposes before Judge Cote (the "Coordinated FHFA Cases").

On May 4, 2012, the District Court denied, in part, the defendants' motion to dismiss in the UBS Case[1] (the "May 4 Order"), holding that as a result of the "extender statute" in the Housing and Economic Recovery Act of 2008 ("HERA"), the FHFA's claims are not time-barred. On May

[1] *FHFA* v. *UBS Americas, Inc. et al.*, No. 11-cv-5201(S.D.N.Y.) (DLC) (the "UBS Case").

23, 2012, the defendants in the UBS Case (the "UBS Defendants") moved the District Court to certify an interlocutory appeal to the Second Circuit from the May 4 Order, and the District Court granted the motion on June 19, 2012. On August 14, 2012, the Second Circuit granted UBS's motion for leave to appeal the May 4 Order, and set an expedited briefing schedule. *See FHFA v. UBS Americas, Inc. et al.*, No. 12-3207cv ("UBS Appeal"). The expedited appellate schedule requires full briefing by November 8, 2012, and oral argument "as early as the week of November 26, 2012."

The defendants in the other Coordinated FHFA Cases, including Ally, have now each moved in the District Court to dismiss their respective FHFA Case. Those motions to dismiss remain *sub judice*, and expressly incorporate and adopt the same arguments at issue in the UBS Appeal. Because the District Court has expressly stated that it intends to rule on these arguments in the same way it ruled on these issues in the UBS Case,[2] the Second Circuit's ruling in the UBS Appeal could significantly impact the FHFA's claims in all of the Coordinated FHFA Cases.

Today, September 7, 2012, UBS filed an emergency motion with the Second Circuit to stay the UBS Case[3] (the "Stay Motion")—including discovery—during the pendency of the UBS Appeal.[4] The Stay Motion also seeks to stay all of the Coordinated FHFA Cases, including the Ally Case, during the pendency of the appeal. The Stay Motion is premised on the fact that "[w]hile the appeal is pending . . . the parties and the District Court continue to face virtually unprecedented efforts, costs and expenses associated with an extremely compressed discovery schedule" in the 16 Coordinated FHFA Cases and those efforts "will all be for naught" if the Second Circuit were to rule in UBS' favor. (Stay Motion at 3.) UBS also requested that the Second Circuit "decide the [Stay Motion] as soon as practicable to avoid the enormous costs being incurred on a daily basis by the parties to the FHFA Actions, the taxpayers funding this litigation, hundreds of third parties and the District Court." (Stay Motion at 1.)

The Debtors are among the third parties referred to in the Stay Motion, and would incur significant costs—monetary and otherwise—during the pendency of the UBS Appeal if the Motion were granted, which costs could "be for naught" if the UBS Appeal is successful. And, in light of the request by UBS for expeditious treatment of the Stay Motion, there may be clarity on this issue in short order. [5]

Accordingly, the Debtors respectfully request that the Court adjourn the hearing on the Motion currently scheduled for September 11, 2012 at 2:00 p.m. until the Second Circuit decides the

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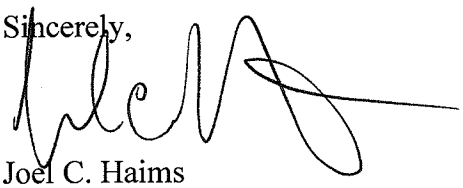
[2] *See* Tr. of Dec. 2, 2011 Conf. at 31, enclosed herein as Exhibit 1.
[3] The District Court denied UBS' application for a stay on September 4, 2012.
[4] The Memorandum of Law in Support of the Stay Motion is enclosed herein as Exhibit 2.
[5] Even if the Second Circuit were to stay only the UBS Case, the effect on the other Coordinated FHFA Cases will be the same because, as the FHFA has asserted before this Court, "a delay in just one [of the Coordinated FHFA Cases] will not only halt the progress of [that c]ase, but will have an impact on other [Coordinated FHFA Cases]." (FHFA Supplemental Filing at 14 (ECF# 1297).)

Stay Motion, at which time the parties will know whether discovery in the Ally Case will be proceeding, and on what schedule.

We are available at the Court's convenience to discuss this and any other issue.

Sincerely,



Joel C. Haims

Enclosures

cc: All Counsel (by email)

EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

IN RE:
FEDERAL HOUSING FINANCE AGENCY 11 CV 5201 (DLC)

----------x

Also Docket Nos.
11 CV 6188, 11 CV 6189, 11 CV 6190,
11 CV 6192, 11 CV 6193, 11 CV 6195,
11 CV 6196, 11 CV 6198, 11 CV 6200,
11 CV 6201, 11 CV 6202, 11 CV 6203,
11 CV 6739, 11 CV 6916, 11 CV 7010,
11 CV 7048

----------x

VNB REALTY,
Plaintiff, 11 CV 6805

v.

Bank of America, et al.
Defendants.

----------x

New York, NY

December 2, 2011
2:00 p.m.

Before:

HON. DENISE L. COTE,

District Judge

this, your Honor -- and this will be helpful to us when we confer amongst ourselves, and I'm sure when the defendants do -- but I am assuming that it is not the case that a decision on a complaint that's common will end up necessarily to be binding as to all other matters.

This is, I take it, your Honor, for the Court's edification on issues that might deem to be common, but there are many, many different issues in all of these complaints including ones that would differ with respect to almost all of the claims. So, while some of the issues certainly are common and some of the legal argument will be common, there are so many factual disparities and the like that the Court isn't suggesting, I assume, that there will be a binding effect to the motion on the first complaint.

THE COURT: No, that is absolutely correct. Thank you so much, Mr. Kasowitz for raising that issue. It's an important thing for us to all -- for me to articulate my understanding of the impact of the decision on the motion to dismiss in 5201.

Every case is being treated on its own merits. This is not consolidated litigation. So I will do my best to address any motion to dismiss that is made in 5201. The complaint will survive or it won't. If it survives, I plan -- right now, I am going to be a lot wiser after I address this motion practice, but the presumption would be that discovery

will go forward in all cases, at least document discovery and at least core document discovery, and we are about to get to the discovery issue in a moment.

But there would be a right to bring other motions to dismiss in the other actions or no motion to dismiss an answer, but in bringing a motion to dismiss and I've denied the argument that you're about to make in addressing the same issue in 5201, I plan probably to just adopt my reasoning in 5201.

Again, the only exception that I am thinking about now, and I will be much wiser after I have the full briefing on that first motion to dismiss, is whether or not if some other case has a terrific statute of limitations argument that has not been captured by the 5201 briefing, whether or not I should stay discovery in that particular action because of its unique statute of limitations argument.

So does that answer your question Mr. Kasowitz?

MR. KASOWITZ: It does, your Honor. Thank you.

THE COURT: Meanwhile, I would be resolving the remand motions as promptly as I could.

So I think just to summarize where we are again -- you can revisit this after you have your joint meeting -- but there is only going to be one motion to dismiss. It's going to be in 5201. We are not going to have a motion to dismiss in 6188. There is nothing to be gained by it at this initial phase.

And we move on now to discovery. Let me talk about

discovery. I do think it makes sense for counsel to start their discussions about electronic discovery protocols, and that we set a schedule today for those discussions to be completed and any failures to agree to be raised with me.

I am going to let during the break you folks talk about what would be a reasonable schedule for those discussions given the fact that it's December and we are moving into the holiday period, but I would like an end date for an agreement or a two-page letter to me outlining the issues that there is a failure to agree upon and then we will have a conference.

With respect to document discovery, I can't remember who mentioned it here, but someone mentioned the loan files. Are the loan files electronic or are they hard copy?

MR. SELENDY: Your Honor, Phillipe Selendy. Typically in our experience, the electronic files, the loan files are maintained both in electronic form and hard copy, although it depends on how good the operations are of the various banks and services. There is a contractual obligation for those files to be maintained as to every single securitization, and that is because those are the basic documents that inform the quality of the loan, the creditworthiness of the borrower, the value of the property and the like, and the trustees in the various RMBS trusts are entitled to get access to those files.

It's a primary source of evidence, although not the only source of evidence, to test whether the representations of

warranties made as to individual loans are in fact accurate and whether those loans were eligible to be included in the trust or not.

So, all of the defendants who maintain loan files are in fact obligated to maintain them in a way that can be readily transferred upon demand, and that is why we focused upon that as an initial request because that should not be unduly burdensome, and it's something that ought to be maintained in the ordinary course and readily handed over.

THE COURT: They may be accessible, but it may still be burdensome. Can you give me a sense -- and there may be no average -- how many loan files are behind any one securitization?

MR. SELENDY: That does vary. It can range from the thousands to the tens of thousands, although we are prepared to frame a request that is much more narrow than that because we believe that the allegations of systemic representation can be tested on a sampling basis.

So, provided we avoid any cherry picking of those loans, and we identify a random sort, then we can identify a much smaller number in order to then evaluate that. And we would be prepared to do that across the cases.

THE COURT: OK. Is it Mr. Clary?

MR. CLARY: Yes, your Honor. Richard Clary for Credit Suisse defendants, and I am counsel in six of the 18 cases we

EXHIBIT 2

12-3207cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FEDERAL HOUSING FINANCE AGENCY, AS CONSERVATOR FOR THE FEDERAL NATIONAL MORTGAGE ASSOCIATION AND THE FEDERAL HOME LOAN MORTGAGE CORPORATION,

Plaintiff-Appellee,

v.

UBS AMERICAS INC., UBS REAL ESTATE SECURITIES INC., UBS SECURITIES, LLC, MORTGAGE ASSET SECURITIZATION TRANSACTIONS, INC., DAVID MARTIN, PER DYRVIK, HUGH CORCORAN AND PETER SLAGOWITZ,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR EMERGENCY MOTION FOR A STAY OF FURTHER PROCEEDINGS IN THE DISTRICT COURT PENDING APPEAL

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CASES

STATUTES

Defendants-Appellants ("UBS") move on an emergency basis to stay the proceedings below[1] before the Honorable Denise L. Cote in *Federal Housing Finance Agency, as Conservator for the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation v. UBS Americas, Inc., et al.*, No. 11-cv-5201 (the "UBS Action"), and the 15 coordinated actions before Judge Cote (with the UBS Action, the "FHFA Actions"), pending this Court's resolution of UBS's expedited interlocutory appeal of the District Court's denial in part of UBS's motion to dismiss (the "May 4 Order"). UBS respectfully requests that the Court decide the motion as soon as practicable to avoid the enormous costs being incurred on a daily basis by the parties to the FHFA Actions, the taxpayers funding this litigation, hundreds of third parties and the District Court.

INTRODUCTION

This appeal arises from the District Court's denial, in large part, of UBS's motion to dismiss a securities action brought by the Federal Housing Finance Agency ("FHFA") on behalf of the Federal National Mortgage Association

[1] UBS seeks a stay of all proceedings in the District Court, except for the briefing on any pending motions to dismiss. The District Court denied UBS's application for a stay, joined by Defendants in all FHFA Actions, by order dated September 4, 2012, a copy of which is attached as Exhibit U to the accompanying Declaration of Jay B. Kasner, dated Sept. 7, 2012 (cited herein as "Decl. ¶ _."). The 15 coordinated proceedings are identified at paragraph 17 of the Kasner Declaration. Exhibits to the Kasner Declaration are cited herein as "Ex. __." Unless otherwise indicated, all emphasis in case and statutory citations is added.

("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac") – the two largest purchasers and issuers of residential mortgage-backed securities ("RMBS") in the world. FHFA's claims relate to Fannie Mae and Freddie Mac's purchase of RMBS between four and six years prior to the filing of this Action.

In the May 4 Order, the District Court held, *inter alia*, that FHFA's claims were not barred by the statutes of repose found in the Securities Act of 1933 ("Securities Act"), 15 U.S.C. § 77m, and certain "Blue Sky" state securities laws, because Section 12 of the Housing and Economic Recovery Act ("HERA"), 12 U.S.C. § 4617(b)(12)(A), purportedly extended these statutes of repose for an additional three years from September 6, 2008 – the date Fannie Mae and Freddie Mac were placed into conservatorship. The District Court adopted FHFA's argument that HERA should be construed to implicitly extend "statutes of repose," notwithstanding that the statutory language expressly extends only "statutes of limitations" and in the face of two decisions of this Court expressly recognizing the distinction between the two principles.[2] Notably, since the May 4 Order was issued, the United States government itself has taken a view directly opposite that of FHFA and of the District Court in an appeal pending in the United States Court of Appeals for the Fourth Circuit. (*Infra* at 19.) Other federal courts interpreting

[2] *Ma v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 597 F.3d 84 (2d Cir. 2010); *P. Stolz Family P'Ship L.P. v. Daum*, 355 F.3d 92, 103 (2d Cir. 2004).

materially identical extender statutes have also agreed that extensions of "statutes of limitations" do not simultaneously extend "statutes of repose." (*Infra* at 19-20.)

The instant appeal will be fully briefed by November 8 and is scheduled to be heard by this Court as early as the week of November 26 – less than 90 days from now. While the appeal is pending, however, the parties and the District Court continue to face virtually unprecedented efforts, costs and expenses associated with an extremely compressed discovery schedule in the 16 FHFA Actions, which involve over 100 defendants and 450 RMBS offerings. Combined, discovery in these actions will include more than 650 document custodians, more than 500 third-party subpoenas, upwards of hundreds of party and third-party depositions, complicated and expensive "forensic re-underwriting" of tens of thousands of mortgage loans and the review and production of tens of millions of pages of documents – all under an accelerated discovery schedule. The massive discovery costs and burdens incurred during the pendency of the appeal will all be for naught if this Court were to rule in UBS's favor, as such a ruling would eliminate all claims against UBS. Given what the District Court termed "the extraordinary cost and burden of this litigation," (Ex. D at 19-20), a stay of proceedings pending resolution of the appeal is appropriate.

Indeed, the District Court's decision to certify an interlocutory appeal recognized that appellate review may relieve the parties, the public and the District

Court of the extraordinary costs and burdens associated with the FHFA Actions:

> An appellate ruling that HERA's timeliness provision does not abrogate statutes of repose would significantly narrow the scope of discovery in this case and the proof that the parties would be able to present at trial, saving the parties and the public time and money . . . .

FHFA v. UBS Americas, Inc., et al., 11-cv-5201(DLC), 2012 WL 1570856, at *27 (S.D.N.Y. June 19, 2012) (the "Certification Order").

Accordingly, by the District Court's own reasoning, resolution of the appeal herein will significantly reduce or entirely eliminate the costs and burdens associated with the FHFA Actions and will result in significant savings for the parties, the public and the courts. Such savings, however, are being squandered on a daily basis by the extraordinarily burdensome discovery taking place in the District Court which, absent a stay, will continue during the pendency of this appeal. The savings envisioned by the Certification Order will only be fully realized if this Court grants a stay pending resolution of the appeal. *See, e.g.*, *Estate of Re v. Kornstein Veisz & Wexler*, No. 94 Civ. 2369 SS, (S.D.N.Y. Sept. 24, 1997) (Sotomayor, J.), ECF No. 118; cases cited *infra* at 12-13.

As many of the RMBS purchases that are the subject of the FHFA Actions stretch back as far as six years, FHFA cannot seriously contend that it will be prejudiced by having discovery suspended for a period of months while the appeal is pending. Rather, FHFA and the taxpayers ultimately responsible for funding this litigation will ultimately benefit from a stay as they too face huge

discovery-related burdens that may be obviated by this Court's ruling.

FACTUAL BACKGROUND

A. Fannie Mae and Freddie Mac's Role in the RMBS Market

Fannie Mae and Freddie Mac are the two largest and most sophisticated issuers and purchasers of RMBS in the world. As government-sponsored yet publicly-traded entities ("GSEs") specifically chartered by Congress to provide liquidity and affordability to the U.S. housing market, the GSEs purchased nearly one-third of all private-label RMBS issued between 2004 and 2008 and also issued billions of dollars of their own RMBS. (Decl. ¶ 9.) The GSEs thus "played a critical role in developing and sustaining the secondary mortgage market," and were "at the center of the U.S. housing market and one of its main driving forces." *In re Fannie Mae 2008 Sec. Litig.*, 742 F. Supp. 2d 382, 392 (S.D.N.Y. 2010).

As part of their domination of the U.S. mortgage market, the GSEs were deeply involved in the purchase and sale of RMBS backed by higher-risk mortgage loans. (Decl. ¶ 11.) Indeed, Fannie Mae and Freddie Mac have conceded in non-prosecution agreements ("NPAs") entered into with the United States Securities and Exchange Commission that they misled investors regarding the extent of their exposure to the same types of higher-risk mortgages at issue here, had extensive relationships with originators such as Countrywide Home

Loans and were intimately familiar with the "volatile" nature of the loans they originated and the standards used to originate them. (*Id.*)[3] The GSEs' knowledge of such origination practices is highly relevant to, among other things, several applicable defenses in the FHFA Actions.

B. The FHFA Actions

On July 27, 2011 – nearly three years after FHFA was appointed conservator for Fannie Mae and Freddie Mac – FHFA commenced the UBS Action. (*Id.* at ¶ 13.) On September 2, 2011, FHFA amended the complaint in the UBS Action and commenced sixteen separate actions in the district courts of this Circuit and New York state court against numerous financial institutions. (*Id.* at ¶¶ 13-15.) The complaints collectively allege that Fannie Mae and Freddie Mac purchased nearly 450 RMBS certificates with an aggregate original principal balance of nearly $200 billion and that the offering documents for each of the securitizations contained various misrepresentations or omissions in violation of (i) Sections 11 and 12(a)(2) of the Securities Act, 15 U.S.C. §§ 77k, *l*(a)(2), and (ii) certain "Blue Sky" state securities laws. (*Id.*) FHFA did not designate the actions in federal court as related and initially argued that "broad coordination between and among

[3] The SEC also filed complaints against several former GSE executives for misrepresenting the GSEs' full exposure to subprime mortgages. (Ex. I, Complaint, *SEC v. Syron, et al.*, No. 11 Civ. 9201(RJS) (S.D.N.Y. Dec. 14, 2011); Ex. J, Complaint, *SEC v. Mudd, et al.*, No. 11 Civ. 9202(ALC) (S.D.N.Y. Dec. 16, 2011).) (motion to dismiss denied August 30, 2012).

the [actions] would not be appropriate or efficient." (Ex. W at 5.) By Order dated November 16, 2011, the sixteen actions in the Southern District of New York were assigned to Judge Cote. (Decl. ¶ 16.)

C. UBS's Motion to Dismiss and the May 4 Order

On January 20, 2012, UBS moved to dismiss FHFA's Second Amended Complaint (the "SAC") on grounds that were common to all of the FHFA Actions. (*Id.* at ¶ 19.) Among other things, UBS argued that because FHFA's purchases of the Certificates occurred more than three years prior to bringing suit, its claims were time-barred by operation of the applicable three-year and two-year statutes of repose found in the Securities Act and certain state Blue Sky laws. (Ex. L at 13-17.) In response, FHFA urged the District Court that Section 12 of HERA extended these statutes of repose for an additional three years from the date Fannie Mae and Freddie Mac were placed into conservatorship – September 6, 2008. Section 12 of HERA reads, in pertinent part:

> [T]he applicable statute of limitations with regard to any action brought by the Agency as conservator or receiver shall be—
>
> (i) in the case of any contract claim, the longer of—
>
> (I) the 6-year period beginning on the date on which the claim accrues; or
>
> (II) the period applicable under State Law; and
>
> (ii) in the case of any tort claim, the longer of—
>
> (I) the 3-year period beginning on the date on which the claim accrues; or
>
> (II) the period applicable under State Law.

12 U.S.C. § 4617(b)(12)(A).

Based on the plain reading of this "extender statute," and relying on distinctions recognized by this Court in *Ma v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 597 F.3d 84 (2d Cir. 2010), and *P. Stolz Family P'Ship L.P. v. Daum*, 355 F.3d 92, 103 (2d Cir. 2004), UBS argued that HERA applied only (i) to "statutes of limitations" and not statutes of repose, and (ii) to state, not federal, law claims. (*See* Ex. L.) On May 4, 2012, the District Court denied UBS's motion in large part, dismissing a negligent misrepresentation claim but upholding all other claims. *UBS Americas, Inc.*, 2012 WL 1570856. The District Court ruled that notwithstanding the plain language of Section 12 of HERA, the extender statute applied to both statutes of limitations and statutes of repose and applied to claims brought under both federal and state law. *Id.* at *2 - *6.

D. The District Court Orders Burdensome Accelerated Discovery

With the May 4 Order denying in large part UBS's motion to dismiss, the stay of discovery imposed by virtue of the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(b)(3)(B), was lifted. (Decl. ¶ 28.) Following scheduling conferences held on May 14 and June 13, the District Court entered a scheduling order dated June 14, 2012 (Ex. O, the "Scheduling Order") providing for what FHFA has described as a "very compressed timetable for discovery." (Ex. Y, at 6). The District Court entered the Scheduling Order over Defendants' objections that they would not be afforded sufficient time to adequately prepare

their defenses against FHFA's claims. (Decl. ¶ 31.) Indeed, despite the fact that the FHFA Actions involve over a million mortgage loan files and tens of millions of pages of documents, the Scheduling Order calls for the substantial completion of document discovery by September 30, 2012, the beginning of depositions in January 2013, and the completion of depositions only six months later, in June 2013. (Ex. O.) The District Court has further ordered that Defendants may collectively depose only 20 Fannie Mae and Freddie Mac witnesses, and that such depositions must be conducted jointly by all 100 defendants. Thus, Defendants must coordinate amongst themselves (i) which individuals to depose, (ii) when to depose them, and (iii) which particular Defendant(s) will lead the particular deposition. (Decl. ¶ 30.)

Moreover, the District Court acknowledged that litigating the FHFA Actions would require the review and analysis of tens of thousands of voluminous loan files – most of which were in the hands of third parties and would need to be obtained through third-party subpoenas – in order to determine whether particular breaches of underwriting guidelines occurred on a loan-by-loan basis. (Ex. Y at 16 (District Court describing the production and review of loan files as "essential to the prosecution" of the 16 cases).) At the July 31 conference, counsel for FHFA acknowledged that this loan-by-loan re-underwriting process would be "truly laborious" and "truly burdensome." (Ex. P at 12-13.) On this front, approximately

150 third-party subpoenas have been served since June 2012 to 121 entities believed to be in possession of relevant loan files. (Exs. R & S.) Defendants have also produced approximately 170,000 loan files to FHFA. (*Id.*)

E. UBS's Interlocutory Appeal is Certified and Accepted

On June 16, 2012, the District Court granted UBS's motion for an interlocutory appeal of the May 4 Order pursuant to 28 U.S.C. § 1292(b), stating that the issue of whether "HERA displaces the statute of repose" presented controlling questions of law, the resolution of which would hasten the termination of the action and about which there existed a substantial ground for difference of opinion. *UBS Americas*, 2012 WL 1570856, at *26. The District Court specifically noted that a case such as the UBS Action, where "a long trial is envisioned to determine liability over a defense disputing the right to maintain the action," is precisely the situation Congress had in mind when enacting 28 U.S.C. § 1292(b). *Id.* at *27. In so holding, it concluded that resolution of the appeal would "significantly narrow the scope of discovery in this case and the proof that the parties would be able to present at trial," and that "there can be no question that such a ruling would importantly affect the conduct of [the] action." *Id.* at *28. In light of the enormous resources that would be expended not only by the District Court and Defendants but also by FHFA (and the taxpayers ultimately responsible for its litigation expenses), the District Court concluded that appellate resolution

would ultimately "save[] the parties and the public time and money." *Id.*

This Court granted permission to appeal on August 14, 2012 and agreed to hear the appeal on an expedited basis. (Ex. B.)[4]

F. The District Court Refuses UBS's Request To Stay Proceedings

On August 17, 2012, UBS submitted a letter to the District Court, which was joined by all Defendants, requesting (1) a stay of discovery proceedings in the FHFA Actions pending resolution of UBS's appeal or (2) in the alternative, a partial stay of certain specific discovery proceedings. (Ex. T.) On September 4, 2012, the District Court denied the application for a stay. (Ex. U.)

ARGUMENT

A STAY OF PROCEEDINGS PENDING RESOLUTION OF UBS'S EXPEDITED APPEAL SHOULD BE GRANTED

Pursuant to 28 U.S.C. § 1292(b), this Court may stay proceedings in the District Court on its own authority pending resolution of an interlocutory appeal. *See* 28 U.S.C. § 1292(b). A motion for such relief is not an appeal of a District Court order; indeed, this Court may grant an emergency motion to stay proceedings in the District Court pending appeal regardless of whether the District Court has first adjudicated the motion. *See U.S. SEC v. Citigroup Global Mkts.*,

[4] UBS's merits brief is due by September 19, 2012; FHFA's opposition brief is due by October 25, 2012; and UBS's reply brief is due by November 8, 2012. The appeal will be heard as early as the week of November 26, 2012. (Ex. C.)

673 F.3d 158 (2d Cir. 2012).

The decision whether to stay proceedings pending interlocutory appeal requires consideration of the following factors: (1) whether irreparable injury will be sustained absent a stay; (2) whether a stay will injure the non-appellant or the public interest; and (3) the likelihood of success on appeal. *Thapa v. Gonzales*, 460 F.3d 323, 334 (2d Cir. 2006); *Citigroup*, 673 F.3d at 162. These factors are interrelated and treated as a "sliding scale," where "'more of one excuses less of the other.'" *Thapa*, 460 F.3d at 334.

Applying these factors, courts in this Circuit and elsewhere have granted such stays where, as here, continued proceedings would waste the litigants' and the judiciary's time and resources. *See, e.g.*, *Estate of Re v. Kornstein Veisz & Wexler*, No. 94 Civ. 2369 SS, (S.D.N.Y. Sept. 24, 1997) (Sotomayor, J.), ECF No. 118 (staying all discovery pending resolution of interlocutory appeal); *id.* at ECF No. 117 (agreeing with party that "it would be a waste of judicial and litigant time and resources to pursue discovery until the appellate process has concluded"); *Ritz Camera & Image LLC v. Sandisk Corp.*, No 5:10-cv-02787 JF/HRL, ECF No. 84 (N.D. Cal. Sept. 7, 2011) (granting stay pending appeal in light of "the well-documented cost of discovery"); *Asis Internet Services v. Active Response Group*, No. C07-6211, 2008 WL 4279695 at *4 (N.D. Cal. Sept. 16, 2008) ("[a] stay could promote economy of time and effort for the court, counsel and litigants"); *see also*

In re Fosamax Prods. Liab. Litig., No. 06 MD 1789 (JFK), 2011WL 2566074, at *10 (S.D.N.Y. June 29, 2011) (granting stay pending appeal where plaintiff sought only money damages).[5] Just months ago, in *In re Bear Stearns Mortgage Pass-Through Certificates Litigation*, 08-cv-8093 (LTS) (S.D.N.Y.) (filed Sept. 18, 2008), defendants sought a stay pending this Court's interlocutory review of whether *American Pipe* tolling applies to statutes of repose, arguing that, in the absence of a stay, the parties would be subjected to "expensive and burdensome discovery" and that a stay would "avoid potentially wasteful expenditure of time and resources of the parties, non-parties, and this Court." (Ex. Z at 11.) Judge Swain granted the stay on May 16, 2012. (Ex. AA). Given the virtually unprecedented litigation costs associated with the FHFA Actions, the holdings of these cases apply *a fortiori* here.[6]

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[5] The SEC, in a recent brief filed with this Court, argued that "the costs and risks of a trial" would constitute irreparable injury sufficient to justify a stay pending appeal. *See SEC v. Citigroup Global Mkts., Inc.*, No. 11-2557, Document 38-1, at 8.

[6] *Renegotiation Board v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1 (1974), cited by the District Court for the proposition that "mere litigation expense" does not constitute irreparable injury, is inapposite as it did not involve an application for a stay pending interlocutory appeal where allowing burdensome accelerated discovery to continue would eviscerate many of the benefits of the certification process. Rather, it addressed a motion to enjoin administrative proceedings pending resolution of a FOIA request. Unlike the proceedings in *Renegotiation Board*, the FHFA Actions involve considerable system-wide burdens and costs, including the significant time constraints imposed on the parties and the District Court, the unprecedented costs associated with the accelerated discovery schedule, the potential waste of taxpayer money and the burden on third parties.

A. Defendants Will Suffer Irreparable Harm Absent A Stay

A failure to stay the FHFA Actions pending appeal will irreparably injure approximately 100 defendants across the FHFA Actions. *See Citigroup*, 673 F.3d at 169 (granting stay pending appeal where movant showed "serious, perhaps irreparable" harm). As discussed above, the District Court noted that the statute of repose issue should be addressed now, since "an intermediate appeal may avoid protracted litigation." *UBS Americas*, 2012 WL 1570856, at *28. The policy underlying statutes of repose – *i.e.*, to establish a date certain after which a defendant's potential liability is extinguished – would be undermined if UBS were required to devote enormous resources and time in defending against claims that have been extinguished. Moreover, the absence of a stay will require all parties to allocate extraordinary resources to defending these matters over the next several months – which could total tens, if not hundreds, of millions of dollars in combined fees and expenses. *See Sutherland*, 2012 WL 751970, at *4 (considering litigation costs in granting stay where appellate resolution of the issue "may be dispositive of this case"); *O'Brien v. Avco Corp.*, 309 F. Supp. 703 (S.D.N.Y. 1969) (granting stay because appellate determination might dispose of entire suit).

Indeed, the parties to the FHFA Actions:

- have agreed to over 650 combined document custodians;
- have served or plan to serve over 500 third-party subpoenas;
- expect to produce and review tens of millions of documents – indeed,

FHFA alone has indicated that it anticipates producing "upward of 1.7 million documents" in these actions by September 30; and

- expect to take hundreds of party depositions between January and June, 2013,[7] which does not include additional Rule 30(b)(6), expert and third-party depositions. (Decl. ¶ 41.)

Significantly, the FHFA Actions will require the immediate review and analysis of tens of thousands of voluminous loan files – most of which are in the hands of third parties – to determine whether particular breaches of underwriting guidelines occurred on a loan-by-loan basis. (Decl. ¶¶ 33-35.) Counsel for FHFA has conceded that this process is "truly laborious." (Ex. P at 12.)

In addition to the irreparable harm to the Defendants, the FHFA Actions also involve substantial system-wide costs, including the significant time constraints imposed on the parties and the District Court, the need for the District Court to address numerous discovery disputes remaining between the parties, the unprecedented costs associated with the expansive and expedited discovery schedule, the potential waste of taxpayer money and the substantial burden on hundreds of third parties forced to respond to subpoenas issued in these Actions. A stay pending appeal will dramatically reduce such system-wide costs.[8]

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[7] While Judge Cote gave FHFA the right to take upwards of 320 depositions of Defendants, the Defendants as a group are only permitted to take 20 depositions total of Fannie Mae, Freddie Mac and FHFA employees, thus causing the disproportionate burden of deposition discovery to fall on Defendants.

[8] As the District Court has noted, the UBS Action is the "linchpin in the coordinated work in which all parties are engaged in this complex litigation." (Ex. *(cont'd)*

B. FHFA Will Not Suffer Any Prejudice

While Defendants will be severely and irreparably injured in the absence of a stay, FHFA will not be harmed in any way by a stay pending appeal. *See Sutherland*, 2012 WL 751970, at *3 ("[T]he only harm to [plaintiff] from a stay is delay in achieving a final resolution of her claim, and that harm may be fully remedied by an award of pre-judgment interest."). Indeed, the RMBS purchases in these actions stretch back as far as 2005 – over six years before FHFA ultimately brought suit. After sitting on its claims for this extended period of time, FHFA cannot credibly contend that it will be prejudiced by having to wait an additional number of months while the appeal is pending. *Cendant Corp. v. Forbes*, 72 F. Supp. 2d 341, 343 (S.D.N.Y. 1999) ("[Plaintiff], for its part, has failed to show how it will ultimately be prejudiced by the intervening delay, since any monetary award is subject to interest.").

To the contrary, FHFA and the taxpayers funding this litigation may ultimately benefit from a stay of proceedings in the District Court pending appeal, as FHFA also stands to spend millions of taxpayer dollars prosecuting these Actions while facing the risk that its claims will be dismissed on threshold legal

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U at 5.) While the District Court held that a stay of only the UBS Action would "derail" the coordinated actions before Judge Cote, (*id.*), a stay of all FHFA Actions would have no such "derailing" effect; instead, it would simply postpone proceedings during the pendency of the appeal.

issues. As the District Court recognized in the Certification Order, an appellate ruling by this Court on the statute of repose issue would "sav[e] the parties and the public time and money." *UBS Americas*, 2012 WL 1570856, at *28. A stay also will serve the public interest by preventing the unnecessary use of judicial resources. *Sutherland*, 2012 WL 751970, at *4 (granting stay where "considerations of judicial economy counsel . . . against investment of court resources in proceedings that may prove to have been unnecessary").[9]

C. UBS Has a Likelihood of Succeeding on Its Appeal

Finally, the third factor – the likelihood of success on appeal – weighs in favor of a stay. This Court deliberately avoided "setting too high a standard" for the "likelihood of success" factor. *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002). Indeed, where, as here, an appeal "presents an issue of first impression"

[9] In denying the stay request, the District Court cited this Court's decision in *Citigroup*, 673 F. 3d 158, for the proposition that it is bound to "give deference to [FHFA's] assessment of the public interest." (Ex. U at 3-4.) The deference afforded to the SEC in *Citigroup* concerned "wholly discretionary matters of policy" – the decision to settle. *Citigroup*, 673 F.3d at 163. Even if, *arguenedo*, deference is to be afforded in that context, such deference cannot extend to matters involving litigation where an agency is a litigant. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) (affording "deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate"). Moreover, the District Court ignored the very next line of this Court's opinion, which stated that such deference "does not mean that a court must necessarily rubber stamp all arguments made by such an agency." *Citigroup*, 673 F.3d at 168. Furthermore, FHFA has argued elsewhere that it is not "not a government actor" when acting as conservator for the GSEs. (Ex. CC at 18-20.)

within this Circuit about which the "Court of Appeals may disagree" with the District Court, "that reason alone" demonstrates a likelihood of success. *Jock v. Sterling Jewelers, Inc.*, 738 F. Supp. 2d 445, 447 (S.D.N.Y. 2010).

1. The Plain Text of HERA Supports Dismissal

It is well established that "[t]he starting point in interpreting a statute is its language, for '[i]f the intent of Congress is clear, that is the end of the matter.'" *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409 (1993) (citation omitted). Here, Section 12 of HERA on its face applies only to "statutes of limitations," not "statutes of repose," and, in any event, only to "state" and not "federal" law claims.

2. This Court Has Emphasized the Distinction Between Statutes of Limitations and Statutes of Repose

While the question of whether Section 12 of HERA encompasses statutes of repose is one of first impression in this Circuit, UBS's plain reading of HERA is compelled by long-standing precedent in this Court which has recognized fundamental differences between the two concepts. In *Ma*, this Court emphasized that "a statute of limitations creates an affirmative defense where plaintiff failed to bring suit within a specified period of time after his cause of action accrued, often subject to tolling principles. By contrast, a statute of repose extinguishes a plaintiff's cause of action after the passage of a fixed period of time . . . ." *Ma*, 597 F.3d at 88 n.4. Statutes of repose – which are substantive, as opposed to

procedural, in nature – function to bar causes of action "from ever arising." *P. Stolz*, 355 F.3d at 103.

Just last month, the United States government filed an *amicus* brief with the Fourth Circuit in which it argued that "[s]tatutes of limitations and statutes of repose address different issues and serve different functions" – the precise argument UBS has advanced throughout these proceedings. *See* United States *Amicus Curiae* Brief, submitted in *Waldburger v. CTS Corp.*, No. 12-1290, ECF No. 20 at 8 (4th Cir. Aug. 16, 2012) (attached as Exhibit V). In *Waldburger*, the district court held that a federal provision, which on its face applies only to "statutes of limitations," did not, by its terms, operate to displace substantive statutes of repose. *Waldburger*, No. 11-cv-39, 2012 WL 380053, at *1 (W.D.N.C. Feb. 6, 2012). In its *amicus* brief in support of the district court's decision, the United States stressed that the statute's "plain text makes clear that it has no application to statutes of repose." (Ex. V at 9.) This argument is squarely at odds with FHFA's (and Judge Cote's) reading of HERA.

3. Other Courts Have Adopted UBS's Plain Reading of HERA

Two federal courts that have addressed whether the same language found in Section 12 of HERA applies to statutes of repose have resolved the question in UBS's favor. *See Nat'l Credit Union Admin. Bd. v. RBS Sec. Inc.*, No. CV 11-5887-GW, ECF No. 126 (C.D. Cal. Dec. 19, 2011); *Resolution Trust Corp.*

v. Olson, 768 F. Supp. 283, 285 (D. Ariz. 1991). In *National Credit Union*, Judge Wu, in a series of tentative decisions, expressly rejected the plaintiff's argument that "the statute of limitations/statute of repose distinction [is] no distinction at all" and refused to construe the extender statute to extend the Securities Act's three-year statute of repose. *NCUA*, ECF No. 126 (Jan. 30, 2012). In confirming the tentative decisions, Judge Wu considered and expressly rejected the District Court's May 4 Order. (Ex. DD, at 1.) Similarly, in *Resolution Trust Corp.*, Judge Copple held that an identical extender statute applies only to statutes of limitations, not statutes of repose. 768 F. Supp. at 285.

CONCLUSION

For the foregoing reasons, UBS respectfully requests that this Court grant UBS's motion.

Dated: New York, New York
September 7, 2012

Respectfully submitted,

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